

MINUTES

COMMITTEE: Ethics Committee

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7. ADVICE TO THE PROFESSION REGARDING TRANSMISSION OF CONFIDENTIAL INFORMATION OVER THE INTERNET

Transmission of confidential information over the Internet

The Ethics Committee has received a number of enquiries regarding the propriety of communicating confidential client information by electronic mail (“e-mail”) over the Internet.

A lawyer’s duty under Chapter 5 of the *Professional Conduct Handbook* to protect confidential client information implies a duty to use methods of communication with clients that provide a reasonable assurance that communications will remain confidential.

E-mail on the Internet is transmitted over ordinary telephone lines and is, therefore, unlike cordless or cellular telephone messages, which are broadcast over the open airwaves. Computers owned by third parties help distribute e-mail over the Internet at various stages in the transmission. An e-mail message, or portions of it, may go through more than a dozen intermediate computers before reaching the intended recipient. The use of these intermediate computers accounts for the major portion of confidentiality problems, since it is at that stage that the message is most vulnerable to interception.

A high level of security for e-mail can be provided by the use of encryption software. There are a number of different encryption programs available including one that can be downloaded from the Internet.

For more information on a lawyer’s use of e-mail, see Hill, “An overview of security on the Internet” from *Internet Law For Small Business*, prepared for Continuing Legal Education Society, May 1998; “High-Tech Ethics and Malpractice Issues,” 1996 *Symposium Issue of the Professional Lawyer* 51; Hricik, “Confidentiality and Privilege in High-Tech Communications,” 8 *Professional Lawyer* 1 February, 1997; Dodd and Bennett, “Waiver Of Privilege and the Internet” Vol. 53, Part 3 May, 1995 *Advocate*; and Chang, “Using e-mail to enhance your practice,” March/April 1998 *The National*.

It appears clear from these and other authorities that, although interception of e-mail on the Internet is possible, the chances of obtaining useful information from an e-mail interception are not significantly better than the chances of obtaining similar information from the interception of an ordinary land-line telephone call. Moreover, unauthorized interception of an Internet message in transit appears to be prohibited by section 184(1) of the *Criminal Code*.

The question of whether an unauthorized interception of an e-mail message on the Internet causes the information to lose its privileged character is an open question in Canada: [See Dodd and Bennett, "Waiver of Privilege and the Internet"]. However, in our view, it is probable that a court would find that an inadvertent or unauthorized disclosure of privileged information on the Internet does not defeat the privilege for such information. The chances that privilege would survive such a disclosure may be enhanced by including in the e-mail message a notice, similar to the notice lawyers include in faxed messages, that the information contained in the message is confidential.

In our opinion, the nature of e-mail transmission on the Internet and the fact that its unauthorized interception is prohibited by law create a high expectation of privacy for the information contained in the message. For that reason, we are of the view that, unless unusually sensitive information is being transmitted that requires enhanced security measures, it is not a violation of a lawyer's duty of confidentiality to transmit confidential, unencrypted client information by e-mail over the Internet.

However, we recommend that lawyers take special precautions when transmitting information by e-mail because of the novelty of e-mail transmission for business purposes, the uncertainty regarding whether privilege may be lost through interception and the potential for serious business losses and other losses as a result of an interception.

Confidential information transmitted by e-mail should contain a clause that claims confidentiality. In addition, lawyers should inform clients about the potential risks of e-mail transmission and seek client consent to its use. Properly informed clients may wish to protect confidential information by declining to use e-mail or by having e-mail communications encrypted.